SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE McHUGH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and the Associate Justices Thereof:

Summary Statement of the Matter Involved

On August 18, 1946, in Dade County, Florida, petitioner, Grady Lee McHugh, while driving an automobile, collided with a motor scooter upon which two boys, Charles Peeples and Robert Collins, were riding, as a result of which both boys were killed. McHugh was charged in one Information (Case No. 14581) with manslaughter for the death of Charles Peeples, and in another Information (Case No. 14582) with manslaughter for the death of Robert Collins. He was first tried for manslaughter for the death of Charles Peeples (Case No. 14581) and acquitted, after which the

State forced him to trial on the second Information (Case No. 14582) notwithstanding his plea that he had already been acquitted of the supposed offense, and secured a conviction. McHugh appealed to the Supreme Court of Florida, challenging the State's right under the 14th Amendment to the Constitution of the United States to try him a second time for manslaughter resulting from a single, identical, indivisible, unintentional act or omission after he had been once acquitted of that offense, and discharged thereon. The Supreme Court of Florida affirmed the judgment (*McHugh* v. *State*, Fla. 36 So. (2d) 786), denied a petition for rehearing, and stayed enforcement of the judgment pending an application to this Court for certiorari to review said judgment of affirmance; hence this petition for certiorari.

How the Question Arose and Was Presented

On October 24, 1946, the State of Florida filed an information against Grady Lee McHugh (Record: 1-2) charging him with manslaughter by culpable negligence for the death of Robert Collins. On June 12, 1947, that information was quashed on motion of the County Solicitor, prosecuting for the State, and an Amended Information was filed. (Record: 2) The Amended Information (Record: 3-4) charged manslaughter by culpable negligence, and the *second* (Record: 3-4) charged manslaughter by operating a motor vehicle while intoxicated.

To said Amended information defendant (Petitioner) filed a plea of *autrefois acquit* (Record: 5-7) alleging that the Robert Collins, named in said amended information was the same person who, together with one Charles Peeples was riding on a motor scooter at the time and place mentioned in said amended information, at the time said motor scooter was struck by an automobile driven by said defend-

ant, as a direct and proximate result whereof said Robert Collins and Charles Peeples sustained mortal injuries of which they and each of them did die; that on October 24, 1946, the State of Florida by and through its County Solicitor filed information in the name of said State, which was docketed as Case No. 14581, whereby said State charged that said Grady Lee McHugh on August 18, 1946, did by his act, procurement and culpable negligence operate a motor vehicle in such a negligent, careless and reckless manner as to run into, upon and against Charles Peeples with such force and violence as to inflict upon his body certain wounds from which he died, etc., contrary to the form of the Statute and against the peace and dignity of the State of Florida; that the Charles Peeples mentioned in said information was the same person who was riding on said motor scooter with said Robert Collins, and the alleged collision mentioned in said information was the same collision aforesaid as a result of which both said Robert Collins and said Charles Peeples suffered and sustained mortal injuries of which both of them died as aforesaid; that on December 12, 1946, said defendant (Petitioner) was arraigned in open court and pleaded not guilty thereto and elected to be tried by jury; on April 29, 1947, said issue came on for trial in said court before Honorable Ben C. Willard, as Judge, and a jury, duly sworn, who returned their verdict finding said defendant (Petitioner) not guilty of said offense; that said verdict was duly received, filed and said jurors discharged from further consideration of said cause, upon consideration whereof the Court entered its judgment that said defendant (Petitioner) was not guilty, whereby said defendant (Petitioner) was wholly acquitted of said charge and discharged, and that said offense is the same identical offense as that charged in the (Amended) information filed in said cause.

To said plea the State filed a demurrer (Record: 8) which the Court by its order (Record: 8) sustained.

Defendant (Petitioner) then pleaded "not guilty" (Record: 8) and the cause proceeded to trial upon said amended information and plea of not guilty. (Record: 9) At the close of the State's case, the Assistant County Solicitor elected (Record: 9) to abandon the First Count (Record: 3-4), whereupon the court instructed the jury (Record: 9) that the State had elected to abandon the first count, and to rely on the second count.

The jury returned a verdict (Record: 9) finding defendant (Petitioner) guilty, upon which the court entered judgment, and imposed sentence. (Record: 10) Defendant (Petitioner) filed a motion for new trial which the Court denied. (Record: 10-11.)

Defendant (Petitioner) filed his notice of appeal to the Supreme Court of Florida (Record: 11) and filed his grounds of appeal (Record: 12-13) or assignments of error, which were:

(1) The Court erred in sustaining the State's demurrer to defendant's plea of *autrefois acquit* by its order (T. 14-15) entered in said cause on June 23, 1947, recorded and entered by the Clerk of said Court in Minutes of said Court (T. 15), in Criminal Court of Record Minute Book A-14 at page 405, of the Minutes of said Court.

(10) The Court erred (T. 173) in adjudging defendant guilty upon the verdict.

(11) The Court erred (T. 174) in imposing sentence upon defendant.

(12) The Court erred in entering judgment and sentence (T. 177-178) on September 18, 1947, as recorded in Criminal Court of Record Minute Book A-15 at page 68 of the minutes of said Court.

(13) The Court erred by its order denying defendant's motion for new trial (T. 184), entered on September 23, 1947, recorded in Minute Book A-15 at page 72 of the Minutes of said Court.

(15) By its order sustaining the State's demurrer to defendant's plea of *autrefois acquit* (T. 14-15) and by its judgment and sentence (T. 177-178) the Court denied defendant the protection of Section 12 of the Declaration of Rights of the Constitution of Florida, and denied defendant the protection of the Fifth Amendment of the Constitution of the United States, and denied defendant the protection of the Fourteenth Amendment of the Constitution of the United States.

The record on appeal was prepared pursuant to written directions (Record: 13-14) and said cause was submitted to the Supreme Court of Florida which rendered its opinion (Record: 14-16) that the judgment should be affirmed, and its judgment (Record: 16) of affirmance. Appellant (Petitioner) filed his petition for a rehearing (Record: 19) which was denied by order (Record: 18) entered on September 27, 1948.

On October 6, 1948, Appellant (Petitioner) filed an application for a stay of proceedings (Record: 18-19) in order to permit him to apply to this Court for a writ of certiorari, and on said date the Court by its order (Record: 19-20) granted said stay conditioned that appellant (Petitioner) file a bond, which bond (Record: 19-20) was duly filed.

On December 10, 1948, the appellant (Petitioner) and the Appellee (Respondent) filed in the Supreme Court of Florida, a stipulation (Record: 20-24) indicating the portions of the record to be included in the transcript of record to be filed in this Court, and the record has been prepared, transmitted to and filed in this Court.

Jurisdictional Statement

The final decision and judgment of the Supreme Court of Florida was entered on the date hereinabove given and the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U.S.C.A. 344. This Petitioner asserts and claims that his rights, privileges and immunity secured and guaranteed him under the Fourteenth Amendment to the Constitution of the United States have been denied him, and that he has been deprived of his liberty without due process of law by the order (Record: 8) of the Court sustaining the State's demurrer to his plea of *autrefois acquit*, and by the order (Record: 11) denying his motion for new trial, and by its judgment and sentence (Record: 14-16) and judgment (Record: 16) of affirmance by the Supreme Court of Florida, and by the order (Record: 18) of said Supreme Court denying his petition for a rehearing, because, Petitioner respectfully contends that since his plea (Record: 5-7) which was admitted by demurrer, shows that the death of the two boys, Charles Peeples and Robert Collins was the result of a single, identical, individual act or omission on the defendant's (Petitioner's) part, without any intention on his part either to injure them or cause their deaths, that the State of Florida had no lawful right under the Fourteenth Amendment to the Constitution of the United States and Sections 1 and 12 of the Declaration of Rights of the Constitution of Florida, to carve out of that single, identical, indivisible and unintentional act or omission more than *one offense* or crime, to-wit: manslaughter, and that when defendant (Petitioner) was acquitted upon said charge of manslaughter arising out of said single, indivisible, unintentional act or omission, as alleged in his plea (Record: 5-7) the power of the State to prosecute was thereby ex-

hausted, and he could not be tried for manslaughter a second time without depriving petitioner of his rights, privileges and immunities as a citizen of the United States, nor without depriving him of liberty without due process of law guaranteed by said Amendment, as defined by this Court in *Betts* v. *Brady*, 316 U. S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 and *Screws* v. *U. S.*, 325 U. S. 91, 65 S. Ct. 1038, 89 L. Ed. 1495, Test 1499, and that said question decided by the Supreme Court of Florida, has not theretofore been determined by this Court or has been decided by the Supreme Court of Florida in a way not in accord with applicable decisions of this Court.

Prayer

Wherefore your petitioner prays that Writ of Certiorari issued under the Seal of this Court, directed to the Supreme Court of Florida commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court had in the case of Grady Lee McHugh, Appellant, versus State of Florida, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the Judgment hereof of said Supreme Court be reviewed by this Court and for such further relief as to this Court may seem proper.

Dated this 20th day of December, 1948.

L. J. Cushman, Counsel for Petitioner.

L. J. Cushman, Attorney for Petitioner, 710 Biscayne Building, Miami 32, Florida, Phone — 9-1857.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE MCHUGH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Grady Lee McHugh, seeks to review by certiorari the opinion and judgment of the Supreme Court of Florida reported as *McHugh* v. *State* (Fla.), 36 So. (2d) 786, reprinted in full as an appendix hereto.

Jurisdiction

The Supreme Court of Florida is the highest court of that state in which a decision could be had,[1] and this peti-

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[1] The Criminal Court of Record of Dade County, Florida, was established by c. 5764 Laws of Fla. 1907; c. 6573 Laws of Fla. 1913, pursuant to Sec. 24, Art. 5, Constitution of Florida and vested with jurisdiction (Sec. 25, Art. 5, Const. of Fla.; Sec. 32.01 Fla. Stat. 1941) to try all criminal cases not capital, upon information (Sec. 28, Art. 5, Const.; Sec. 32.18 Fla. Stat. 1941) filed by the County Solicitor, designated as Prosecuting Attorney (Sec. 32.16 Fla. Stat. 1941). Proceedings in said Court are

tion for certiorari is sought to review its final judgment or decree rendered in a certain cause lately determined by it, entitled Grady Lee McHugh, Appellant vs. State of Florida, Appellee. (*McHugh* v. *State*, 36 So. (2d) 786), jurisdiction of this court being invoked under Section 237 (b) of the Judicial Code, as Amended by the Act of February 13, 1925, Ch. 229; 43 Stat. 937; 28 U.S.C.A. 344, upon the ground that by said opinion and judgment petitioner was deprived of his rights, privileges and immunities guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and was or will be thereby deprived of his liberty without due process of law, in violation of said Amendment, in that the supposed offense charged against him by the information (Record: 3-4) upon which he was convicted (Record: 10) was only a mere part of a single, identical, indivisible offense or crime of manslaughter for which he had previously been tried, found "not guilty", acquitted and discharged, and that by the opinion and judgment of the Supreme Court of Florida affirming said judgment of conviction, petitioner was deprived of his right and privilege to be thereafter immune from further prosecution for the same offense, and was or will be deprived of his liberty thereby (unless same be reversed by this court) without due process of law because said conviction for the same identical, single, indivisible offense of which he had previously been tried, found "not guilty", acquitted and discharged, and in affirming said conviction, said Supreme Court of Florida denied petitioner his fundamental rights and departed from long established procedural requirements which divested the State Court of Jurisdiction of said cause as well

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reviewable by appeal (Sec. 924.01 and 924.06 Fla. Stat. 1941) from the Criminal Court of Record to the Supreme Court, Sec. 924.08 Fla. Stat. 1941; Sec. 5, Art. 5 Const.) the Supreme Court being the highest court, and court of last resort of said State. See: Sec. 1, Art. 5, Constitution of Fla.

as of petitioner, therefore the sentence and judgment imposed by the State Court, and the opinion and judgment of the Supreme Court of Florida affirming same was illegal, and if same remains effective petitioner will be deprived of his liberty in violation of his right as secured by the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

On August 18, 1946, in the darkness before dawn, Grady Lee McHugh was driving an automobile in an easterly direction on the Tamiami Trail in Dade County, Florida. At the same time two boys, Charles Peeples and Robert Collins, riding on a motor scooter without lights, were also proceeding east on the Tamiami Trail. McHugh ran into the scooter, and as a result, both boys received injuries from which they died. On October 24, 1946, two informations were filed against McHugh in the Criminal Court of Record of Dade County: The *first*, Case No. 14581, charged him with manslaughter for causing the death of Charles Peeples by culpable negligence in the operation of an automobile.[2-3] The *second* Case No. 14582, (Record: 1) charged him with manslaughter for causing the death of Robert Collins by culpable negligence in the operation of an automobile. On April 29, 1947, McHugh was tried before a jury for manslaughter upon the information in Case No. 14581, and found "not guilty", acquitted and discharged. The County Solicitor then quashed the information which had been filed in Case No. 14582 charging manslaughter by culpable negligence (Record: 2) and filed an amended information (Record: 3-4) consisting of two counts; the *first* (Record: 3) was a mere re-statement of the original charge of manslaughter (Record: 1)

[2-3] These facts were alleged in defendant's plea (Record: 5-6) and admitted by the State's demurrer (Record: 8).

based on culpable negligence, and the *second* (Record: 3-4) charged manslaughter by driving while intoxicated. Defendant (Petitioner) pleaded (Record: 5-7) his prior acquittal as a bar to further prosecution under the Amended Information, and the State demurred (Record: 8) and its demurrer was sustained (Record: 8) and thus, by that ruling, we contend, petitioner was denied his rights and privileges guaranteed by the Fourteenth Amendment to the Constitution of the United States. Defendant pleaded not guilty, and the cause proceeded to trial during which the State elected (Record 9) to abandon the *first* count (Record: 3) and to proceed on the *second* count (Record: 3-4) which resulted in a verdict (Record: 9) of guilty and a judgment and sentence (Record: 10) against him. An appeal was taken from that judgment and sentence (Record: 11-12) to the Supreme Court of Florida, and the order sustaining the State's demurrer to said plea was assigned as error (Record: 12), particularly in these words:

> "(15) By its order sustaining the State's demurrer to defendant's plea of autrefois acquit (T. 14-15) and by its judgment and sentence (T. 177-178) the Court denied defendant the protection of Section 12 of the Declaration of Rights of the Constitution of Florida, and denied defendant the protection of the Fifth Amendment of the Constitution of the United States, and denied defendant the protection of the Fourteenth Amendment of the Constitution of the United States."

The judgment was affirmed (Record: 14-16) and by this Petition, we seek to review the judgment of the Supreme Court of Florida, upon the ground that by its judgment of affirmance, petitioner has been denied his rights and immunity guaranteed by the Fourteenth Amendment, and has been deprived of his liberty without due process of law in violation of said Amendment.

ARGUMENT

The Right to Be Immune from a Second Prosecution a Fundamental Right Protected by the 14th Amendment

The source and foundation of the right not to be placed in jeopardy a second time for the same offense, the right relied upon here by petitioner, was clearly stated by Mr. Justice Miller, speaking for this court in Ex parte Lange, 85 U. S. 163, 18 Wall. 163, 21 L. Ed. 872:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.
>
> And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.
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> The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause.[4] *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.
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> In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, *"Nemo bix puniture pro eodem delicto."* (2 Hawk. P. C. 377), or, as Coke has it, *"Nemo debet bis puniri pro uno delicto."* 4 Co. 43a; 11 Co. 95b. No

[4] Underscored portion in italics in court's opinion.

one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

Blackstone in his Commentaries cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 Black, 315 (Shars). —* * *

In the case of *Com.* v. *Olds,* 5 Litt. 137, one of the best common-law judges that ever sat on the bench of the court of appeals of Kentucky remarked, "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict.* To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question."

In the case of *Cooper* v. *State,* in the supreme court of New Jersey (1 Green N. J. 361), the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction at bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the Constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common

law maxim the court says: "The Constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict.*"

And Hawkins, in his Pleas of the Crown (pp. 515, 526), says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man shall . . . not be brought into danger of his life for one and the same offense more than once. * * *"

See also, the discussion by Mr. Justice Day, in *Kepner* v. *United States,* 195 U. S. 100, 100 S. Ct. 137, 49 L. Ed. 114.

The right to be immune from a second prosecution for the same offense is one of the rights guaranteed and protected by the 14th Amendment to the Constitution of the United States: *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 91, 89 L. Ed. 1495; *Screws* v. *United States* 325 U. S. 91 where Mr. Justice Douglas, speaking for this court defined the rights protected by that Amendment as follows:

"There have been conflicting views in the Court as to the proper construction of the due process clause. The majority have quite consistently construed it in broad general terms. Thus it was stated in Twining v. New Jersey, 211 US 78, 101, 53 L ed 97, 107, 29 S Ct 14, that due process requires that 'no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of

law and protect the citizen in his private right, and guard him against the arbitrary action of government.' In Snyder v. Massachusetts, 291 US 97, 105, 78 L ed 674, 54 S Ct 330, 90 ALR 575, it was said that due process prevents state action which 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' The same standard was expressed in Palko v. Connecticut, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct 149, in terms of a 'scheme of ordered liberty'. And the same idea was recently phrased as follows: 'The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such denial.' Betts v. Brady, 316 US 455, 462, 86 L ed 1595, 1601, 62 S Ct 1252."

Here There Was a Single Offense

Charles Peeples and Robert Collins came to their deaths by the same, identical, single, indivisible act or transgression on the part of Grady Lee McHugh. If he was criminally responsible for the death of one, then of necessity, he was equally criminally responsible for the death of the other. On the other hand, if he was innocent of any crime arising out of the death of Charles Peeples, the conclusion is inescapable that he was likewise innocent of any crime arising out of the death of Robert Collins. How could McHugh be "not guilty" of manslaughter in connection with the killing of Robert Collins, his companion, whose death was the result of the same, identical, single, indivisible, unintentional act or transgression which brought about the death of Charles Peeples? Sometimes the law

does produce absurdities, but such results add nothing to confidence in the law, in the courts, nor in justice as administered by the courts. No amount of legal sophistry can make such a result conform to common sense.

In *State* v. *Wheelock,* 216 Iowa, 1428, 250 NW 617, Wheelock had been indicted for manslaughter for the deaths of Mildred Telfer, and her two daughters, Merwyn and Erma Telfer, all of whom had been killed in the same automobile accident. Three indictments had been returned, each charging manslaughter for the killing of one of the victims of the wreck. He was first placed on trial for manslaughter upon the charge of killing Mildred Telfer, the mother, and was acquitted. The court pointed out the dilemma presented by a result such as that reached by the court in the case at bar, saying:

> "The question presented to us is whether the defendant was subject under the circumstances to three prosecutions under three indictments or whether a prosecution of one operated as a bar to the others. * * * *The state contends* that the killing of three persons necessarily results in the commission of three separate offenses, and that therefore judgment in one may not operate as a bar to another. *On the other hand, the defendant contends* that the act of transgression charged against defendant was essentially, and in a legal sense a single act, the result of which was at no time contemplated or intended by the defendant.
>
> * * * if the defendant was not guilty of the conduct that resulted in the death of Mrs. Telfer, as adjudicated in the first prosecution, he could not be guilty of causing the death of either daughter. The acquittal in the first prosecution would be completely contradicted by a conviction in the second."

Thus, in the case at bar, the acquittal of McHugh in the first prosecution (Case No. 14581) was completely contradicted by the conviction in the second. (Case No. 14582)

In cases where several people are killed, can the state prosecute, again and again and again, until at last some jury is found who will convict? In *State* v. *Evans,* 33 W. Va. 417, 10 S. E. 792, Lucas, J., speaking of the identity of offenses necessary to sustain a plea of *autrefois acquit,* said:

> "A case can be conceived where such a plea might be held good. For example, the engineer of a railway train might be charged with negligently and feloniously causing the death of one passenger in a wreck, and, being tried and found by the jury entirely blameless for the accident, such acquittal might perhaps, constitute a perfect defence to a subsequent indictment for killing another passenger, who was on the same train."

Let us suppose that a bus driver, operating a bus with fifty (50) passengers should be involved in a crossing accident, and as a result all fifty (50) of his passengers were killed, he alone having escaped. Suppose he were indicted in fifty (50) separate indictments, for manslaughter, each indictment naming a different passenger. Could he be tried, and acquitted in forty-nine (49) cases, and still convicted in the last case? Such a result would be ridiculous —yet, if the judgment in this case is permitted to stand, it could be done. The simple, inescapable fact is that from such a misfortune a single, indivisible crime or offense, to-wit: manslaughter, may arise, but not fifty (50) separate, distinct, independent crimes or offenses.

"An offense," said Mr. Justice Grier, in *Moore* v. *Illinois,* 55 U. S. 13, 14 Haw. 13, 14 L. Ed. 306, text 309, "in its legal signification, means a transgression of a law." And, "To 'transgress' is to violate or offend against." *Beggs* v. *Beeler,* 180 Tenn. 198, 173 S. W. (2d) 946, 948, 153 A. L. R. 510.

Where Two or More Persons Are Killed by the Same, Single, Identical, Indivisible Act or Transgression If a Crime or Offense Is Thereby Committed, It Is a Single, Indivisible Crime or Offense, and Not Multiple Crimes or Offenses.

Commonwealth v. *Veley,* (1916) 36 Pa. Super. Ct., 489, is an excellent application of this principle, there several persons including Mrs. Eva A. Gleaspey, Mrs. Julia Swartwood and Mrs. Nellie Lawler, lost their lives as result of the breaking of a dam due to defendant's culpable negligence. Defendants were tried for manslaughter for the deaths of Mrs. Gleaspey and Mrs. Swartwood, and acquitted, and thereafter the state attempted to prosecute them for manslaughter for the death of Mrs. Lawler, but the court held that the crime or offense, if any, was single and indivisible, and the acquittal put an end to the accusation forever. Orlady, P. J. speaking for the court said:

> "No man who has been guilty of a crime against society, should be suffered to escape on a mere technical defense, not founded in any principle of natural justice or rule of public policy. But it is also true, that where a man has once been fairly tried, there ought to be an end of the accusation forever. The right not to be put in jeopardy a second time for the same cause, is as sacred as the right to trial by jury, and is guarded with as much care by the common law and by the Constitution. * * * The same principle is announced and followed in United States *v.* Clark, 31 Fed. Rept. 710; People ex rel., Stabile *v.* The Warden, 202 N. Y. 138; Ex parte Neilsen, 131 U. S. 176, 33 L. Ed. 118. The records present the case of several persons losing their lives through the same disaster, viz: the breaking of the dam of the Bayliss Pulp and Paper Company, which in each of these prosecutions is alleged to have been caused by the negligence of the relator through defective construction of the dam.
>
> The negligent act, if any, which caused the breaking of the dam, was the act which caused the deaths of

the three women named. There was but one casual effect, though the result affected many parties.

In Gunter *v.* State, 111 Ala. 23, it was held that where the same act of unlawful shooting results in the death of the two persons, an acquittal on a trial for the murder of one of them bars a second prosecution for the killing of the other. To the like effect see Sadberry *v.* State, 39 Tex. Crim. R. 466; 46 S. W. 639; State *v.* Damon, 2 Tyler (Vt.) 287; State *v.* Rosenbaum, 23 Ind. App. 237: 77 Am. St. Repts. 432.

It follows from the foregoing authorities that, the criminal prosecution is for the injury done the commonwealth, and not for the injury done to the individual who may, if entitled, obtain redress through a civil action. Where there is but one act or cause of injury, or death of a number of persons, there is but one injury to the commonwealth, but where the acts or causes are separate, they are separate injuries to the peace and dignity of the commonwealth.

The protection afforded by the fifth amendment of the Constitution of the United States, that a person shall not be twice placed in jeopardy for the same offense, is not only to protect against the peril of a second punishment, but as well against being tried a second time for the same offense: Kepner *v.* United States, 195 U. S. 100; 49 L. Ed. 114.

The common law not only prohibited a second punishment for the same offense, but went further, and forbid a second trial for the offense, whether the accused had suffered punishment or not, and whether, in the former trial, he had been acquitted or convicted: Ex parte Lange, 18 Wall 163; 21 L. Ed. 872.

If the case, as presented by this record, was before a jury the trial judge would be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered."

Commonwealth v. *Ernesto* (1928) 93 Pa. Super. Ct. 339 was a similar case. A wife and six children lost their lives in a fire which destroyed their home. Defendants were

indicted for manslaughter in seven counts, the first charging manslaughter based upon the death of the wife, and each of the remaining six on the death of a child. The defendants were found guilty on all seven counts, but the court held that the defendants could be sentenced upon only one count, saying:

> "When there is but one act or cause of injury, or death of a number of persons there is but one injury to the commonwealth, but where the acts or causes are separate, they are separate injuries to the commonwealth. * * * The same unlawful act which caused the death of anyone of the persons mentioned in the indictment caused the deaths of the others. There was but one injury to the commonwealth involved in this prosecution and that neither a malicious nor an intentional one insofar as its unfortunate results are concerned."

In *State* v. *Cosgrove* (N.J.) 135 Atl. 871, the court applied the same principle in holding that:

> "Where automobile driver struck two girls crossing street causing death of one and was acquitted for manslaughter for her death, his plea of autrefois acquit was a good plea in bar to indictment for atrocious assault and battery on the other, since both crimes were product of same act."

In *Gunter* v. *State*, 111 Ala. 23, 20 So. 632, was a case in which two people had been killed by a single, indivisible act. Haralson, J., speaking for the court said:

> "It is the settled rule of this court, that a defendant cannot be lawfully punished for two distinct felonies, growing out of the same identical act, and where one is a necessary ingredient of the other; that a series of charges cannot be based upon the same offense, and subdivided into two or more indictable crimes. So, it has been held, that where the same act of unlawful shooting resulted in the death of persons, an acquittal

or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other, for the reason that the killing constituted but one crime, which could not be subdivided and made the basis of two prosecutions. Clem v. State, 42 Ind. 420. And again, where one blow produces two separate assaults and batteries on two different persons, a conviction of one may be pleaded in bar to an indictment for the other, for the reason that the defendant cannot be punished for two distinct assaults growing out of the same identical act. State v. Damon, 2 Tyler (Vt.) 387; State v. Cooper, 13 N. J. Law, 361. These cases and the principles announced, were referred to and approved in Hurst v. State, 86 Ala. 604, 6 South, 120, where the same question was considered and decided by this court upon a careful review of many authorities. Hurst was indicted, tried and convicted for having introduced a file into the county jail, with the intent to facilitate the escape of a prisoner, confined on a charge of a misdemeanor. At the same term of the court, defendant was indicted, tried and convicted for the same act of conveying into the county jail the same file with which to facilitate the escape of another prisoner, confined on a charge of felony, and it was held, on a plea of autrefois convict, that the first conviction was a bar to the indictment in the latter case. O'Brien v. State, 91 Ala. 25, 8 South, 560; Moore v. State, 71 Ala. 387; Gordon v. State, Id. 317. It must not be overlooked, however, that the same individual may at the same time and in the same transaction commit two or more distinct criminal offenses, and an *e*-quittal of one will not bar punishment for the other, as if in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another. In such case, the two results, the killing of the one and the wounding of the other, by different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately

for each. State v. Standifer, 5 Port. (Ala.) 523; Cheek v. State, 38 Ala. 231; and authorities supra."

Wheelock v. *State, supra,* is an exceptionally well considered case in which Wheelock had been charged in three (3) separate indictments with manslaughter for the death of three (3) members (a mother and two daughters) of the Telfer family in an automobile accident; he was tried and acquitted of manslaughter for the death of the mother, and the court held that the crime or offense, if any, was a single, indivisible crime or offense, and his acquittal upon the charge of manslaughter for death of the mother barred further prosecution. This court in part, said:

"The question presented to us is whether the defendant was subject under the circumstances to three prosecutions under three indictments or whether a prosecution of one operated as a bar to the others. The appeal is by the state. Broadly speaking the state contends that the killing of three persons necessarily results in the commission of three separate offenses, and that therefore judgment in one may not operate as a bar to another. On the other hand, the defendant was essentially and in a legal sense a single act, the result of which was at no time contemplated or intended by the defendant. * * * The basic proposition emphasized by the state is that the prohibition of double jeopardy under the Constitution and under the statute is applicable only where the 'same offense' is involved. In identifying an offense as the 'same offense', the state contends that the indictments must disclose the identity both 'in fact and in law', and that there must be an identity, not only of the act of transgression charged against the defendant, but also of the indictable offense as named and defined by the statute. This indicates the general objective of the state's argument. On the other hand, the defendant contends that, in order to find a plurality was contemplated and intended. Cases of murder, robbery, and larceny often come within this category; whereas, *in the case at bar.*

the single act of transgression was that of negligence. The actual results thereof were not contemplated at all and no killing was intended. Concededly the manslaughter was involuntary. The debate between counsel comes down to the point whether the authorities recognize a distinction as to the plurality of offenses which result from accidental causes and those which result from distinct criminal intent and intentionally felonious acts. * * *"

"Under the doctrine of State v. Price, supra, if the defendant was not guilty of the conduct that resulted in the death of Mrs. Telfer, as adjudicated in the first prosecution, he could not be guilty of causing the death of either daughter. The acquittal in the first prosecution would be completely contradicted by a conviction in the second. * * *

Except as to cases of involuntary manslaughter, it is not the purpose, or the purport, of this opinion, to establish any new precedent or to extend or restrict what has already been said in our own cases. Our opinion herein shall go no farther than to determine whether an involuntary manslaughter of two or more persons attributable to the single negligence of the defendant, without any intent on his part to cause any injury, is a single or a multiple offense. If the respective courts differ in their conclusions in cases involving other offenses, such differences arises nevertheless on the question of fact as to whether the intent of the perpetrator was single or plural. In the case before us there is no basis for the claim of multiple intent either as a question of fact or of law. In the careful research of counsel for the state, no manslaughter case has been found to support its contention. All the cases which involve manslaughter speak with one voice on this subject. * * *

In line with all the other courts which have passed upon the specific question, we now hold only that an act of negligence on the part of a tort-feasor, which results in the involuntary killing of two or more human

beings, is ordinarily a single offense and is subject to one prosecution. Such was the case here."

We therefore respectfully submit that in the case at bar if the automobile accident in which Charles Peeples and Robert Collins met their deaths was the result of any crime or offense, or resulted in a crime or offense, it was a single, indivisible offense, and not a multiple crime or offense, and his acquittal upon the charge of manslaughter based upon the death of one of the two boys "should end the accusation forever;" in the language of the court in *Commonwealth* v. *Veley, supra:*

> "* * * where a man has once been fairly tried, there ought to be an end of the accusation forever."

There Was No Material Difference Between the Charge of Which He Was Acquitted, and That of Which He Was Convicted.

The offense charged in the *first* information (Case No. 14581) was manslaughter, and McHugh was acquitted of that charge upon the trial of that case. Count one (Record: 3) and Count two (Record: 3-4) of the *second* or amended information (Case No. 14582) both charged manslaughter. The first (Case No. 14581) information (Record: 6) charged manslaughter in this language, *i.e.*, that McHugh:

> "* * * did then and there by his act procurement and culpable negligence operate a certain motor vehicle in such negligent, careless and reckless manner as to run into, upon and against Charles Peeples with such force and violence as to inflict in and upon the body of the said Charles Peeples mortal injuries of which he the said Charles Peeples then and there died contrary to the form of the Statute," etc.

The original information in Case No. 14582 (Record: 1) charged manslaughter based on the death of Robert Collins

in exactly the same terms. The first count (Record: 3) of the Amended Information in Case No. 14582 charged manslaughter and duplicated the charge in the original information, and also the charge in the first case quoted above. The second count (Record: 3-4) of the amended information, likewise charged manslaughter in that McHugh:

> "* * * did then and there unlawfully, while intoxicated drive a certain motor vehicle * * * and by driving and operating said motor vehicle as aforesaid, while intoxicated as aforesaid, did then and there strike, wound and injure one Robert Collins, and by thus striking * * * did inflict * * * a certain mortal wound * * * from which * * * said Robert Collins did then and there die, contrary to the form of the Statute" etc.

The charge was "manslaughter"—nothing else. McHugh was acquitted of "manslaughter" for the death of one boy, and convicted of "manslaughter" for the death of the other: a legal paradox rivaling the riddle of the sphinx of ancient times.

"Manslaughter" is an offense defined by the law of Florida, which can be committed in nine (9) different ways.[5]

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[5] The Statutes of Florida contain these provisions with reference to manslaughter:

"782.01—*Homicide Generally*—The killing of a human being is either justifiable or excusable homicide, or murder or manslaughter, according to the facts and circumstances of each case.

782.07—*Manslaughter*—The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.

782.08—*Assisting self-murder.*

782.09—*Killing of unborn child by injury to mother.*

782.10—*Abortion—(killing by).*

Regardless of the method employed the offense is still manslaughter. The Statutes (Sec. 782.01, and 782.07) defining manslaughter, and all the other statutes [5] declaring killings under various circumstances to be manslaughter, are part of Florida Statutes 1941, a compilation adopted as the Statutory Law of Florida by c. 20719 Laws of 1941, approved June 6, 1941. Hence, the statutes declare "manslaughter" a crime or offense which may be committed in the various ways specified by the several sections.[5] Where a statute defines a crime or offense which may be committed in several ways it creates *a single crime or offense,* which however, may be committed in different ways—not distinct or different crimes. See: *U. S.* v. *Buckner* (1937) 37 F. (2d) 378; *U. S.* v. *Wilson,* 32 U. S. 150, 7 Pet. 150, 8 L. Ed. 640 and *U. S.* v. *Adams,* 281 U. S. 202, 50 S. Ct. 269, 74 L Ed. 807. So, manslaughter is a single crime or offense, whether the killing be (1) "by the act, procurement or culpable negligence of another," as declared by Sec. 782.07, or (2) "by the operation of a motor vehicle by any person while intoxicated" as declared by Sec. 860.01, or any other of the circumstances declared by the statutes.[5] Murder is murder, whether committed with a gun, a knife, a club, poison or with any other method, and an acquittal on a charge of murder by a gun would bar any further prosecution for the same offense whether the second charge alleged the crime to have been committed with a knife, a club or poison. The mere fact that the prosecution may fail because of a variance between the charge laid in the indictment, and the proof offered to sustain it, would not authorize the state to try a defendant a second time for the same offense by

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782.11—*Unnecessary killing to prevent unlawful act.*
782.13—*Killing by Mischievous animal.*
782.14—*Death from racing steamboat.*
782.15—*Killing by intoxicated physician.*
860.01—*Driving automobile while intoxicated; punishment.*

merely changing the allegation as to the *means employed* to perpetrate the crime, because jeopardy attaches *when the accused is placed on trial and the jury sworn and empaneled even though no verdict is ever returned,* as when the state elects to enter a *nolle prosequi* over the accused's objection. See: 22 C. J. S. "Criminal Law"—392.

McHugh's Acquittal Completely Negatived Every Material Allegation of the Information on Which He Was Later Convicted.

While the first information (Case No. 14581) charged manslaughter by the "act, procurement or culpable negligence" of the defendant, yet evidence to prove that he was intoxicated was clearly admissible upon the trial of that case, as the Supreme Court of Florida held in *Cannon* v. *State,* 91 Fla. 214, 107 So. 360, text (4) page 362. In that case the indictment had been drawn under Sec. 5039 R. G. S. 1920 (Sec. 782.07 Fla. Stat. 1941) and not under Sec. 5563 R. G. S. 1920 (Sec. 860.01 Fla. Stat. 1941), yet the court held that evidence of intoxication was admissible:

> "It is therefore plain that this indictment is predicated upon said section 5039 of the Revised General Statute; that it does not omit any requisite averment as to any of the elements of the offense under said section (Mills v. State, 51 So. 278, 58 Fla. 74); and that it does not constitute a charge of two separate and distinct offenses in the same count (Griswold *v.* State, 82 So. 44, 77 Fla. 505), though the latter is allowable in certain cases, where a statute makes either of two or more distinct acts, connected with same general offense and subject to the same punishment, indictable as distinct crimes. *When in such cases such distinct acts are connected with the same general offense and committed by the same person at the same time, they*

may be coupled in the same count and constitute but one offense. Irvin *v.* State, 41 So. 785, 52 Fla. 51, 10 Ann. Cas. 1003.

As against the plaintiff in error, Bessie Cannon, the indictment is sufficient, without this allegation in regard to defendant being under the influence of intoxicating liquors, to charge her with manslaughter under said section 5039, and said allegation, not being necessary or essential to describe or charge the offense, and not descriptive of any matter necessary to be proved, may be treated as surplusage, not being essential to the charge of the crime defined in section 5039. *This does not mean that testimony as to defendant being in such condition could not be admitted in evidence in support of the element of culpable negligence.* Hobbs *v.* State, 91 So. 555, 83 Fla. 480; Shaw *v.* State, 102 So. 550, 88 Fla. 320; Meier *v.* State, 99 So. 124, 87 Fla. 133; Denmark *v.* State, 102 So. 246, 88 Fla. 244; Mathis *v.* State, 69 So. 697, 70 Fla. 194; Padgett *v.* State, 24 So. 145, 40 Fla. 451; Norwood *v.* State, 86 So. 506, 80 Fla. 613. * * *

It was permissible, as shown by some of the cases above cited, to allow the state to introduce evidence showing or tending to show that the defendant was under the influence of intoxicating liquor at the time the deceased was struck and injured, or that she was in that condition so shortly thereafter as to afford a reasonable inference that such condition existed at the time of the injury. See, also, 1 Wigmore on Evidence (2d Ed.) 235. This was admissible in support of the charge of culpable negligence, upon the theory that, ordinarily, persons under the influence of intoxicants to any considerable degree, though not actually intoxicated or drunk, are more apt to be heedless, reckless, and daring than when free from such influence. Hobbs *v.* State, supra; Meier *v.* State, supra."

Thus, it is clear that when McHugh was tried on the first information (Case No. 14581) drawn under Sec. 782.01,

evidence to prove intoxication was admissible, and as the court pointed out:

> "When * * * such distinct acts[6] are connected with the same general offense and committed by the same person at the same time they may be coupled in the same count AND CONSTITUTE BUT ONE OFFENSE."

In other words, if it were true that McHugh was intoxicated, and was also guilty of culpable negligence, at the same time and place charged, it CONSTITUTED BUT ONE OFFENSE. If, as we contend there was BUT ONE OFFENSE, it could not be split into two prosecutions, and when McHugh was once acquitted, that put an end to the accusation forever. *Commonwealth* v. *Veley, supra.* We submit that there is no escape from the conclusion reached in *State* v. *Wheelock, supra:*

> "Under Section 13915,[7] every material allegation charged in each indictment was completely negatived by the acquittal upon the first prosecution."

Not even the Attorney General will contend, we are confident, that the State could prosecute McHugh a second time for the death of Charles Peepels, after he has been acquitted, by merely changing the information to charge manslaughter by operation of a motor vehicle while intoxicated instead of by culpable negligence. This demonstrates that there was only a single crime or offense, to-wit: manslaughter,

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[6] That is, "culpable negligence" and "intoxication."

[7] Code ¶ 13915—"The jury must render a general verdict of "guilty" or "not guilty" which imports a conviction or acquittal upon every material allegation of the indictment," etc. This is merely declaratory of the Common Law. 16 C. J. "Criminal Law"—1109, *Citing* v. *Francis,* 144 Fed. 520.

whether committed in one way or the other. The fact that two were killed is, under the authorities, immaterial, so far as converting a single, indivisible crime into two crimes.

In *United States* v. *Miner,* Fed. Case No. 15780 the defendant had been indicted for possessing a counterfeit plate, and acquitted. He was later brought to trial on a second indictment charging him with possession of a second counterfeit plate which had been in his possession at the same time and place as the first plate. The syllabus of the case is as follows:

> "A defendant was tried on an indictment charging him with the possession of a counterfeit plate, and was acquitted. A second indictment was found against him, charging him with the possession of another counterfeit plate. He pleaded to the latter indictment, that he had been once tried and acquitted of the same act of possession stated therein. From the evidence to be given on the trial of the second indictment, it appeared, that *the act of possession charged was but a single act, and that the first trial necessarily involved a determination of the act of possession charged in the second indictment.* The verdict of the jury on the first trial met with the approval of the court, and it advised the district attorney that the defendant ought not to be again put on trial on the same evidence and that a nolle prosequi ought to be entered on the second indictment."

Thus, in any view taken the conclusion is irresistible that there was but one offense, to-wit: manslaughter, and when McHugh was acquitted of that offense, that put an end to the accusation forever, and the state had no right to put him on trial upon the second information, and his plea of autrefois acquit should have been sustained and he should have been discharged, therefore the judgment of the

Supreme Court of Florida to the contrary should be reversed.

Respectfully submitted,

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Grady Lee McHugh.

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APPENDIX

SUPREME COURT OF FLORIDA, EN BANC

July 23, 1948

McHUGH

vs.

STATE

Rehearing Denied Sept. 27, 1948

Appeal from Criminal Court of Record, Dade County; Ben C. Willard, Judge

Grady Lee McHugh was convicted of manslaughter by operation of motor vehicle while intoxicated, and he appeals.

Affirmed.

Cushman & Woodard, of Miami, for appellant.

J. Tom Watson, Atty. Gen., and Ernest W. Welch, Asst. Atty. Gen., for appellee.

ADAMS, Justice.

This appeal presents a question of former jeopardy.

Appellant drove an automobile into a motor scooter and killed two news boys riding thereon.

Under Sec. 782.07, Fla. Stat., he was informed against and charged with manslaughter for killing one of the boys through culpable negligence. He was also charged, under Sec. 860.01, Fla. Stat., with manslaughter for killing the other boy by operation of a motor vehicle while intoxicated.

[1] On the former charge he was acquitted and when the other case was called for trial a plea of former jeopardy was interposed. This plea went out on demurrer and upon a plea of not guilty a trial was had resulting in conviction. Section 12, Declaration of Rights, "No person shall be subject to be twice put in jeopardy for the same offense. * * *"

Elaborate briefs have been filed which reveal numerous cases in hopeless conflict.

In this jurisdiction the identical question has not been passed upon. We are of the opinion that the plea of former jeopardy was not tenable and the action of the court in sustaining a demurrer to it was proper. Our reasons are that this view is supported by the great weight of authority. See note in 172 A.L.R., page 1062 following a report of our decision in State v. Bacon, Fla., 30 So. 2d 744, 172 A.L.R. 1050. Also People v. Allen, 368 Ill. 368, N.E. 2d 397; 308 U.S. 511, 60 S.Ct. 132, 84 L. Ed. 436; Fleming v. Commonwealth, 284 Ky. 209, 144 S.W. 2d 220; Commonwealth v. Maguire, 313 Mass. 669, 48 N.E. 2d 665; State v. Fredlund, 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 215; Fay v. State, 62 Okl. Cr. 350, 71 P. 2d 768; Lawrence v. Commonwealth, 181 Va. 582, 26 S.E. 2d 54; State v. Taylor, 185 Wash. 198, 52 P. 2d 1252.

[2] Double jeopardy applies to the offense, not the act causing the criminal offense. The gist of this offense is the unlawful homicide of which there were two. There is an offense for each unlawful homicide. It is not difficult to imagine a case where a defendant might by criminal negligence cause an explosion which would annihilate a number of persons. Great difficulty might arise on proving the actual death of one particular individual, yet it would be a travesty on justice to say that the wrongdoer could not then be again arraigned for the criminal killing of some other named victim. In the two imaginary cases the evidence would be different thereby observing the distinction noted and discussed in Driggers v. State, 137 Fla. 182, 188 So. 118 and other cases cited there.

One of the tests often required by this and other courts is whether the evidence will be the same in each prosecution.

It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other. See State v. Bacon, supra. Each is a separate offense. For an identical case see People v. Trantham, 24 Cal. App. 2d

177, 74 P. 2d 851. See also Culpepper v. State, 44 Ga. App. 351, 161 S.E. 849.

We have considered the other assignments of error and find them without merit.

The judgment is affirmed.

Terrell, Chapman, Barns and Hobson, JJ., concur.

Thomas, C. J., and Sebring, J., agree to conclusion.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE McHUGH,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida is reported in 36 So. 2d 786.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229; 43 Stat. 937; 28 U. S. C. A. 344, upon the claim that he was subjected to double jeopardy in the State Court and that he is entitled to relief under the Fourteenth Amendment.

ARGUMENT

AS TO WHETHER THE RIGHT TO BE IMMUNE FROM A SECOND PROSECUTION FOR THE SAME OFFENSE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT.

As was said in Amrine vs. Tines (C. C. A. 10th), 131 F. 2d 827, in a habeas corpus case involving the question of second jeopardy in a State Court, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment is not generally regarded as a fundamental right protected by the due process and privileges and immunities clauses of the Fourteenth Amendment. We quote from said case as follows:

> "The contention of the appellee, upheld by the trial court, that he was twice placed in jeopardy for the same offense in violation of his constitutional rights, like the question of the right to assistance of counsel, must rest upon the dominant command of the Fourteenth Amendment. And, unlike the fundamental right to assistance of counsel granted by the Sixth Amendment to the Constitution, *the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process.* Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597; Dreyer v. State of Illinois, 187 U. S. 71, 23 S. Ct. 28, 47 L. Ed. 79; Palko v. State of Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Cf. Hurtado v. People of State of California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; Gaines v. State

> of Washington, 277 U. S. 81, 86, 48 S. Ct. 339, 72 L. Ed. 793; see, also, West v. State of Louisiana, 194 U. S. 258, 24 S. Ct. 650, 48 L. Ed. 965; Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423." (Emphasis supplied).

As was also pointed out in Amrine v. Tines, supra, Courts which have had occasion to consider the matter have deliberately refrained from completely closing the door to Federal inquiry and have been content to answer that double jeopardy did not factually exist when measured by the Federal rule. An early case in which the question was left open was Dreyer v. Illinois, 187 U. S. 71; and, as late as Louisiana ex rel. Willie Francis vs. Resweber, 329 U. S. 459, this Court examined the circumstances under the assumption, *"but without so deciding,"* that a violation of the principles of the Fifth Amendment as to double jeopardy would be violative of the due process clause of the Fourteenth Amendment.

Nor is it necessary to decide the question in the case at bar because, as will hereinafter be shown, the facts in this case do not show a second prosecution for the same offense, and do not show that any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, was violated by the conviction of the petitioner for the manslaughter of Robert Collins under one statute, after the petitioner had been acquitted under another statute of the manslaughter of Charles Peeples in the same transaction and by the same act.

HERE, THERE WERE TWO MATERIALLY DIFFERENT OFFENSES, ONE FOR THE KILLING OF EACH OF THE TWO BOYS KILLED BY THE PETITIONER IN THE SAME ACCIDENT.

An exhaustive Annotation on this question is found

on pages 1053-1066 of Volume 172 of American Law Reports. On page 1062, said Annotation, dealing with "Single act causing injury to or death of two or more persons," says:

> "Though the courts recognize that a single act may constitute two or more distinct and separate offenses and a person charged therewith may be punished for all of them, they are not always in accord as to what constitutes distinct and separate offenses arising from a single act. Thus, there is a conflict on the question of how many offenses are committed where two or more persons are injured or killed by a single criminal act in the operation of a motor vehicle. *The majority of courts hold that there are as many separate and distinct offenses as there are persons injured or killed by the unlawful act so that successive prosecutions may be instituted against the person who committed the unlawful act without violating the rule against double jeopardy.*" (Emphasis supplied).

State v. Fredlund (Minn., 1937), 200 Minn. 44, 273 N. W. 353, involved a collision between Fredlund's automobile and a Mr. Busch's automobile. Mrs. Busch and her minor child, Walter Busch, lost their lives in the collision. Separate third degree murder indictments were returned against Fredlund for the killing of Mrs. Busch and the boy. He was acquitted under the indictment charging the killing of Mrs. Busch. Thereafter, he pled this acquittal as a bar to further prosecution under the indictment charging the killing of the boy. The Supreme Court of Minnesota held that Fredlund would not be subjected to double jeopardy by being tried for the killing of the boy after having been acquitted of the killing of Mrs. Busch; and held that, although the same act caused the death of both, two separate and distinct offenses were committed. Among the cases relied upon

by Fredlund were two of the cases cited by the petitioner herein, viz., State vs. Wheelock, 216 Iowa 1428, 250 N. W. 617, and State vs. Cosgrove, 103 N. J. L. 412, 135 A. 871, but the Minnesota Court rejected the doctrine of said cases. Said Court said, in part, that:

> "In the instant case the same act caused the death of two different persons. Obviously the proof of the death of Mrs. Busch cannot possibly acquit or convict defendant of the killing of the child. The only thing determined by the prior adjudication is that as to her death the proof of defendant's misconduct was found insufficient to fasten guilt upon him. This is necessarily so because, by Mason's Minn. St. 1927, § 10066, it is provided: 'No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are each established as independent facts.' "

It is apparent that the Minnesota statute cited in the foregoing excerpt did no more than require that the corpus delicti of the homicide be proved, a universal requirement which is in force in Florida without the necessity of statute.

In the Fredlund case, supra, the Minnesota Supreme Court also said, in part, that:

> "If this were a civil case no one would contend that a verdict exonerating defendant for the death of the mother would in any way impede the right of the son's administrator from proceeding with an action for recovery of damages for death by wrongful act. The result in the mother's trial would not even be considered material to the issues. There can be no doubt then that, if we were to hold with defendant here, we should be compelled to give a wrongdoer, liable as such under the law relating to civil liability, immunity

from criminal punishment for identical acts. In other words, as a tort-feasor defendant could be held to liability, but as to the sovereign state he would be immune. Such result seems to us to be wholly unjustifiable. Surely the wrong to an individual should not be placed upon a higher plane than the same criminal act which gave rise to the civil liability."

* * * *

"In view of present-day conditions, where murderous gangs by means of high powered machine guns, sawed-off shotguns, and the like often cause death to our citizens, and where great bodily injury or death to many may be the result of a single discharge of such weapons, it would indeed be a sad condition of affairs were we to give a narrow construction to the state's right to protect its people. The maxim for which defendant contends was not designed to foster crime but to protect the accused from double jeopardy where in point of fact the criminal act caused a particular individual the harm against which the law is directed. Obviously, we think, it was not intended to be a shield for the murderer behind which he may hide. Other illustrations can easily be made. Thus one might poison a well from which many persons might die because the water therefrom was used by many persons residing in that locality. One might throw a bomb into a large crowd of people and thereby injure many and possibly kill several. Is it reasonable that such well poisoner and bomb thrower should be held immune to prosecutions for the death of his other victims because on the trial of one so killed he was acquitted? The answer is obvious. No reasonable person would be likely to consider such result possible."

In Fay v. State (Okla., 1937), 62 Okla. Crim. 350, 71 P. 2d 768, Fay was charged with assault with intent to kill Genella Brewer with an automobile. He pled

former jeopardy because he had already been convicted of an assault upon Betty Joe Brewer, who was also injured by his car at practically the same time and place. In rejecting his contention and in holding that two offenses were committed, the Oklahoma Court aligned itself with the Courts which hold that, where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there are persons injured by the unlawful act. We quote from said case as follows:

> "While the authorities are not in harmony on the question involved in this case, we hold that the greater weight of respectable authorities sustains the contention of the state that, notwithstanding the fact that the injury of the Brewer girls was caused by the car of the defendant striking them at or near the same time and place, injury to each of the girls constitute a separate offense, and that the contention of the defendant that he could not be put on trial for the injury to Genella Brewer, after he had been tried and convicted and his case pending in the Criminal Court of Appeals for the injury of Betty Joe Brewer, is without merit. *This court holds that where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there are persons injured by the unlawful act.*" (Emphasis supplied.)

In Fleming v. Commonwealth (Ky., 1940), 284 Ky. 209, 144 S. W. 2d 220, Mr. and Mrs. Duval were walking along the highway, and Stapleton was a few feet behind them. Fleming drove his truck against them, killing Duval and Stapleton. Fleming was convicted of involuntary manslaughter because of the killing of Duval. He pled this conviction as former jeopardy when he was charged with the voluntary manslaughter of Stapleton. The trial court disagreed with him and he appealed. The

Court of Appeals of Kentucky rejected his contention in words as follows:

> "We find no merit whatever in the contention that the plea of former jeopardy should have prevailed. This court has definitely decided that where one criminal act results in injury to two or more persons the perpetrator of the act may be tried and convicted as a result of the perpetration of the act on each of the injured parties. For instance, in Com. v. Browning, 146 Ky. 770, 143 S. W. 407, it was held that where two or more persons were wounded by the same shot the conviction for shooting one was not a bar to a prosecution for shooting the other. The authorities generally seem to be in accord on this proposition."

Lawrence v. Commonwealth (Va., 1943), 181 Va. 582, 26 S. E. 2d 54, involved a collision between Lawrence's automobile and a beach wagon in which Ralph Yonkers and Alvin Montgomery were riding. Both Yonkers and Montgomery were killed. When charged with the killing of Montgomery, Lawrence pled former jeopardy by reason of the fact that he had already been convicted of the killing of Yonkers. The Supreme Court of Virginia held that there were two offenses and held that Lawrence's plea of autrefois acquit was properly rejected. Said Court said, in part:

> "We have no intention of whittling away the responsibility of careless or reckless drivers. A list of our dead is eloquent in their denunciation as are the facts in this case."

In People v. Allen (Ill., 1937), 368 Ill. 368, 14 N. E. 2d 397, (*Appeal dismissed and certiorari denied in* 308 *U. S. 511)* Allen's automobile struck three men who were walking abreast across the street. Two of these men, Duran and Klafter, died as the result of the collision.

When Allen was charged with involuntary manslaughter by reason of the killing of Klafter, he pled former jeopardy because he had been discharged in a case in which he had been prosecuted for the involuntary manslaughter of Duran. (The Supreme Court of Illinois held that the discharge was a bar to another trial for the killing of Duran). The Illinois Court reviewed conflicting decisions on the question and decided that the killing of Duran and Klafter were separate offenses and that there was no former jeopardy. In arriving at this decision, the Court considered and rejected the doctrine of State vs. Cosgrove, 103 N. J. L. 412, 135 A. 871, State vs. Wheelock, 216 Iowa 1428, 250 N. W. 617; Commonwealth vs. Veley, 63 Pa. Super. 489; and Commonwealth vs. Ernesto, 93 Pa. Super. 339, which cases are strongly relied upon by the petitioner in the case at bar. Also, said Court said, in part:

> "*Applying these principles to the facts in this case, the question presented is: Could a jury in the former case, which charged the manslaughter of Ray Duran, have returned a verdict for the manslaughter of Charles Klafter? In indictments for offenses against persons or property the name of the person injured must be stated, if known. The necessity for stating the name of the person injured is to enable the defendant to plead either a former acquittal or conviction in case of a second prosecution for the same offense.* People v. Clavey, 355 Ill. 358, 189 N. E. 364; People v. Smith, 341 Ill. 649, 173 N. E. 814; Aldrich v. People, 225 Ill. 610, 80 N. E. 320; Willis v. People, 1 Scam. 399. *An accused cannot be tried for the manslaughter of any other person than the one charged by the indictment upon which he is then being tried. The substance of one crime cannot be proved by proving the substance of another.* State v. Billotto, supra. A conviction or acquittal under one charge is a bar to a prosecution for another crime growing out of the same act only where the offense for

which the accused was tried and acquitted or convicted is but one of the degrees of the same offense for which it is later attempted to put him on trial. People v. Fox, supra. In order for one prosecution to be a bar to another, it is not sufficient to show that the act is the same, but it must be shown that the offense, also, is the same in law and in fact. People v. Fox, supra; People v. Mendelson, supra; Nagel v. People, supra." (Emphasis supplied).

* * * *

"Adhering to the general rule and our former decisions in analogous cases, we hold that the deaths of Ray Duran and Charles B. Klafter named in the separate indictments were separate offenses. The trial court properly denied defendant's petition for discharge."

In State v. Taylor (Wash., 1936), 185 Wash. 198, 52 P. 2d 1252, Taylor's automobile collided with McAllister's automobile. Five people were killed, some being passengers in Taylor's car and some being passengers in McAllister's car. In five separate counts of an information, Taylor was charged with manslaughter by reason of the killing of these five persons, each count charging the death of one of said persons. He was convicted under Counts 1, 3 and 5, and was acquitted under Counts 2 and 4. He applied for and obtained a new trial. Then, he filed a plea of former acquittal and a motion for dismissal of Counts 1, 3 and 5, upon the ground that all five counts had charged the identical and same facts and act and that therefore the acquittal under Counts 2 and 4 barred further proceedings under Counts 1, 3 and 5. The trial court sustained his position and discharged him from further prosecution. The State appealed. The Supreme Court of Washington reversed the order, holding that even though two persons are killed by the same act, each killing constitutes a separate crime.

In line with the majority rule followed in the above cited cases, the Supreme Court of Florida held in the case at bar (McHugh vs. State, 36 So. 2d 786) that the killing of Charles Peeples and Robert Collins were separate offenses. The Florida Court pointed out that:

> "Double jeopardy applies to the offense, not the act causing the criminal offense. The gist of this offense is the unlawful homicide of which there were two. There is an offense for each unlawful homicide. It is not difficult to imagine a case where a defendant might by criminal negligence cause an explosion which would annihilate a number of persons. Great difficulty might arise on proving the actual death of one particular individual, yet it would be a travesty on justice to say that the wrongdoer could not then be again arraigned for the criminal killing of some other named victim. In the two imaginary cases the evidence would be different thereby observing the distinction noted and discussed in Driggers v. State, 137 Fla. 182, 188 So. 118 and other cases cited there.
>
> "One of the tests often required by this and other courts is whether the evidence will be the same in each prosecution.
>
> "It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other. See State v. Bacon, supra. Each is a separate offense."

The said majority rule is in line with the principles laid down by this Court.

In the case of Burton v. United States, 202 U. S. 344, this Court said:

"A plea of autrefois acquit must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' Commonwealth v. Roby, 12 Pick. 496, 504."

"It is well settled that 'the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' 1 Bishop's Crim. Law, § 1051; Wilson v. State, 24 Connecticut 57, 63, 64." (Emphasis supplied).

In Gavieres v. United States, 220 U. S. 338, this Court said:

"In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in Morey v. Commonwealth, 108 Massachusetts 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

" 'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he had been put in jeopardy for the same offense. *A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution* and punishment under the other.'

"This case was cited with approval in Carter

v. McClaughry, 183 U. S. 367,395." (Emphasis supplied).

* * * *

"In Burton v. United States, 202 U. S. 344, Bishop's Criminal Law, vol. 1, § 1051, was quoted with approval to the effect 'jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' In that case this court said, speaking of a plea of autrefois acquit, 'It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' "

In Ebeling v. Morgan, 237 U. S. 625, this Court said:

"As we interpret the statute, the principle applied in Gavieres v. United States, 220 U. S. 338, is applicable, where this court held that, when in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the Supreme Judicial Court of Massachusetts, in Morey v. Commonwealth, 108 Massachusetts, 433, was applied, where it was held that *a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact, and it was there declared that a single act might be an offense against each statute, if each required proof of an additional fact which the other did not,* and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute." (Emphasis supplied).

The case at bar comes within the rules thus laid down by this Court in the Burton, Gavieres and Eberling cases, supra, because (1) in the case at bar the evidence required to support the information for the manslaughter of Charles Peeples would not have been sufficient to support the information for the manslaughter of Robert Collins without proof of an additional fact, and the evidence required to support the information for the manslaughter of Robert Collins would not have been sufficient to support the information for the manslaughter of Charles Peeples without proof of an additional fact; and (2) each of the statutes under which said informations were framed required proof of an additional fact which the other did not.

In the first case, wherein the petitioner was acquitted, he was charged with the manslaughter of *Charles Peeples*. The State was required to make good the allegation that the petitioner took the life of *Charles Peeples;* it was compelled to prove the corpus delicti; which included proof that *Charles Peeples* was killed. In the second case, wherein the petitioner was convicted, he was charged with the manslaughter of *Robert Collins*, and proof of the corpus delicti necessarily included proof that the petitioner took the life of *Robert Collins*. Proof of Robert Collins' death would not have answered the obligation resting upon the State in the first case to prove the death of Charles Peeples and conversely, proof of Charles Peeples' death would not have answered the obligation resting upon the State in the second case to prove the death of Robert Collins.

In other words, there was no double jeopardy because the evidence required to support the one charge would not have been sufficient to warrant a conviction on the other charge without proof of an additional fact.

Furthermore, the information against the petitioner

for killing *Charles Peeples* charged that the petitioner (Tr. 6):

> ". . . did then and there by his act, procurement and culpable negligence operate a certain motor vehicle in such negligent, careless and reckless manner as to run into, upon and against Charles Peeples, with such force and violence as to inflict in and upon the body of the said Charles Peeples then and there died, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Florida . . ."

and said information was framed under Section 782.07, Florida Statutes 1941, which reads as follows:

> "The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars."

On the other hand, the second count of the information against the petitioner for killing *Robert Collins* (Tr. 3-4), under which the petitioner was convicted (Tr. 9-10), charged that the petitioner:

> ". . . did then and there unlawfully, *while intoxicated,* drive a certain motor vehicle, to-wit: an automobile, a further more particular description of said automobile, being to the County Solicitor unknown, which he, the said Grady Lee McHugh, was then and there driving upon and along the public highways of Dade County, Florida, and by driving and operating said motor vehicle as

> aforesaid, *while intoxicated* as aforesaid, did then and there strike, wound and injure one Robert Collins, and by thus striking the said Robert Collins did inflict in, on and upon his said body and head, a certain mortal wound, a further and more particular description of said mortal wound, being to the County Solicitor unknown, of and from which said mortal wound, the said Robert Collins did then and there die, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (Emphasis supplied).

and said information was framed under that part of Section 860.01, Florida Statutes 1941, reading as follows:

> ". . . and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter and, on conviction be punished as provided by existing law relating to manslaughter."

Section 782.07 requires proof of culpable negligence, but Section 860.01 does not. On the other hand, Section 860.01 requires proof of driving while intoxicated, but Section 782.07 does not. Therefore, each statute requires proof of an additional fact which the other does not. For this reason, also, there was no identity of offenses and, consequently, no double jeopardy.

THE PETITIONER'S ACQUITTAL IN THE FIRST CASE DID NOT NEGATIVE EVERY MATERIAL ALLEGATION OF THE INFORMATION UPON WHICH HE WAS CONVICTED IN THE SECOND CASE.

The petitioner cites Cannon v. State, 91 Fla. 214, 107 So. 360, as authority for his contention that the acquittal in the first case negatived every material allegation in the second case. We do not think that the Cannon case supports said contention.

In the Cannon case, the indictment charged manslaughter by culpable negligence, and was held sufficient to charge that offense.

In the Cannon case, the indictment also contained the words, "being at the time under the influence of intoxicating liquor." The Court held that these words were surplusage, they not being essential to the charge laid. The Court also held that these words were not the equivalent of the words "while intoxicated," as used in the statute proscribing manslaughter committed by the operation of a motor vehicle while intoxicated. The Court also held that, under an information charging manslaughter by culpable negligence, it was permissible to show that the defendant was under the influence of intoxicating liquor at the time of the accident, because persons under the influence of intoxicants to any considerable degree are more apt to be heedless, reckless and daring. The Court did not hold that it is necessary to prove the defendant was under the influence of intoxicating liquor in order to make out a case of manslaughter by culpable negligence.

Nor did the Court hold in the Cannon case that a charge under the manslaughter by culpable negligence statute and a charge under the manslaughter by driving while intoxicated statute constituted but one offense and could be coupled in the same count. What the Court did say was that "in certain cases" it is allowable to charge two separate and distinct offenses in the same count as constituting but one offense, where "a statute" makes either of two or more distinct acts, connected with the same general offense and subject to the same punishment, indictable as distinct crimes.

That the petitioner has misconstrued the Cannon case is evidenced by the same Florida Supreme Court's

opinion in the case at bar (36 So. 2d 786), in which it was said:

> "It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. *In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other.* See State v. Bacon, supra. Each *is a separate offense.*" (Emphasis supplied).

Thus, the Florida Court unequivocally held that "*Each is a separate offense,*" and that manslaughter by culpable negligence is not the same offense as manslaughter committed by the operation of an automobile while intoxicated.

The petitioner's acquittal under the first information for the *culpably negligent* killing of *Charles Peeples* did not negative the averment of the second information that the petitioner was driving "*while intoxicated*" when he killed *Robert Collins.*

CONCLUSION

The due process clause of the Fourteenth Amendment prevents State action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (Snyder v. Massachusetts, 291 U. S. 97). It proscribes that which constitutes a denial of fundamental fairness, shocking to the universal sense of justice (Betts v. Brady, 316 U. S. 455).

If it should be thought that the due process clause applies to double jeopardy in State courts, then we submit that the due process clause does not require any such definition of double jeopardy as is contended for by the petitioner.

To hold a person accountable for each life that he criminally takes falls a long way short of offending any "principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." The reverse is true. A fundamental principle of justice rooted in the traditions and consciences of our people is that a man should receive punishment for the criminal homicide of each person unlawfully killed by him, and that he should not escape his just deserts for the killing of one person merely because he has managed to obtain an acquittal for the killing of another person by the same act.

The decision of the Florida Supreme Court, holding that the petitioner was not subjected to double jeopardy, does not constitute a "denial of fundamental fairness, shocking to the universal sense of justice." The fact that the majority of the courts which have passed on the same point agree with the Florida Court, conclusively refutes any idea that such a holding is shocking to the universal sense of justice.

We submit that no fundamental unfairness entered in the Florida Court's decision that there was no double jeopardy, and we submit that the petitioner is entitled to no relief at the hands of this Court.

Respectfully submitted,

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